93-792

No. 93-——

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

SILVEY REFRIGERATED CARRIERS, INC.,
Petitioner,

v.

H.J. HEINZ COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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November 18, 1993

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QUESTION PRESENTED FOR REVIEW

In an action by a motor common carrier to collect its tariff charges may the Interstate Commerce Commission declare the carrier's filed distance rate tariff retroactively void solely because the carrier failed to comply with ICC regulations for the determination of distances?

LIST OF PARTIES

Petitioner, Silvey Refrigerated Express (hereinafter "Silvey") is an Iowa corporation previously engaged in common carrier transportation of freight in interstate commerce. Respondent, H.J. Heinz Company (hereinafter "Heinz"), is a Pennsylvania corporation engaged in food manufacturing.*

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* There are no parent or subsidiary companies to be listed for the corporations named in this list of parties.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is unreported and reprinted at Appendix A. The order and decision of the United States District Court for the Western District of Pennsylvania (Diamond, J.) granting summary judgment for Heinz, is unreported and is reprinted at Appendix B. The report of Magistrate Lancaster adopted by the district court is reprinted at Appendix C.

JURISDICTIONAL BASIS

The judgment of the United States Court of Appeals for the Third Circuit was dated, filed and entered on August 23, 1993. This Court has jurisdiction under 28

U.S.C. § 1254(1). The petition herein was timely filed pursuant to 28 U.S.C. § 2101(c).

STATUTES INVOLVED

49 U.S.C. § 10761. Transportation prohibited without tariff.

> Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff.

49 U.S.C. § 10762. General tariff requirements.

* * * *

> (e) The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.

STATEMENT OF THE CASE

Petitioner Silvey Refrigerated Carriers, Inc. (hereinafter "Silvey") was a motor common carrier operating pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission (hereinafter "ICC" or "Commission"). Silvey operated under Title 49 of the United States Code which governs transportation in interstate commerce.

Pursuant to 49 U.S.C. § 10762(a) Silvey published a tariff containing rates, *inter alia*, stated in cents per mile and filed with the ICC. The filed tariff specified that a distance guide published by Household Goods Carriers Tariff Bureau and filed with the ICC was to be utilized for a determination of distances. Silvey failed to follow ICC regulations set forth at 49 C.F.R. § 1312.4(d) re-

quiring it to provide the publisher of the distance guide with a current power of attorney at the time of the shipments at issue in this case. Silvey brought a civil action against H.J. Heinz Company ("Heinz") to collect freight charges based upon this filed tariff.

On January 23, 1993, the United States District Court for the Western District of Pennsylvania entered summary judgment in favor of Heinz and against Silvey by adopting the report filed by the magistrate. On August 23, 1993 the Third Circuit Court of Appeals affirmed the district court findings and cited *Security Services, Inc. v. K-Mart Corp.*, No. 92-1833 (3d Cir. June 18, 1993) as the compelling Circuit precedent for the affirmance.

REASONS FOR GRANTING THE WRIT

THIS COURT'S GRANT OF CERTIORARI IN *K-MART*, THE DECISION RELIED ON HEREIN, REQUIRES THAT THIS PETITION BE GRANTED.

On October 18, 1993, this Court granted the petition for writ of certiorari in *Security Services, Inc. v. K-Mart Corp.*, 996 F.2d 1516 (3d Cir. 1993), *cert. granted*, 1993 W.L. 345661, 61 U.S.L.W. 3165 (Oct. 18, 1993). As previously stated, the Third Circuit Court of Appeals opinion in this matter affirmed the district court and advised the parties to see the Circuit's recent *K-Mart* decision. Silvey requests that this Court grant its petition, as the decision in *K-Mart* will be controlling precedent. Silvey also requests that this Court hold this petition pending the outcome of the *K-Mart* case.

CONCLUSION

For the foregoing reasons, the Petition of Silvey should be granted and a Writ of Certiorari issued to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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